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UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITE HERE International Union,  
Petitioner,

v.

PALA BAND OF MISSION INDIANS,  
Respondent.

CASE NO. 07-CV-2312 W (AJB)

**PETITIONER UNITE HERE  
INTERNATIONAL UNION'S  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN OPPOSITION TO  
RESPONDENT'S MOTION TO  
DISMISS; REQUEST FOR RULE 56(f)  
CONTINUANCE**

Judge: Thomas J. Whelan  
Date: 10:30 a.m.  
Time: May 19, 2008

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24  
25  
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TABLE OF CONTENTS

INTRODUCTION . . . . . 1

STATEMENT OF FACTS . . . . . 2

ARGUMENT . . . . . 4

I. Federal courts have subject-matter jurisdiction over suits to enforce Tribal-State Gaming Compacts . . . . . 4

    A. Tribal-State Gaming Compacts are a creation of federal statute . . . . . 4

    B. The Ninth Circuit’s Cabazon decision forecloses the Pala Band’s argument that jurisdiction is lacking . . . . . 6

    C. It makes no difference that UNITE HERE seeks to confirm an arbitration award instead of litigating the underlying Compact breach . . . . . 8

    D. Peabody Coal did not involve an IGRA compact. . . . . 8

II. There is a private right of action to confirm the arbitration award . . . . . 9

    A. There is a private right of action to enforce the terms of IGRA Compacts . . . . . 9

    B. The Federal Arbitration Act creates a cause of action to confirm an arbitration award . . . . . 11

III. The Pala Band waived its sovereign immunity by agreeing to arbitrate disputes under the TLRO . . . . . 11

    A. An agreement to arbitrate constitutes a waiver of sovereign immunity . . . . . 11

    B. UNITE HERE can enforce the TLRO . . . . . 13

**TABLE OF CONTENTS**

IV. UNITE HERE exhausted existing tribal court remedies ..... 15

    A. It was impossible for UNITE HERE to file this case in  
        the Intertribal Court of Southern California. .... 15

    B. Exhaustion of tribal remedies is not required in a  
        non-functioning tribal court ..... 16

V. If the Court does not deny the Pala Band’s motion to dismiss, the motion  
    should be converted to a Rule 56 motion for summary judgment and  
    continued to allow UNITE HERE to conduct discovery . .... 18

CONCLUSION ..... 20

**INDEX OF EXHIBITS**

DECLARATION OF KRISTIN L. MARTIN

Exhibit	Page(s)	Description
Exhibit A		Fax from Intertribal Court (November 1, 2007)
Exhibit B		Letter from Martin to Scott (March 10, 2008)
Exhibit C		Arbitration Award of Catherine Harris, <u>Unite HERE v. Pauma Band of Mission Indians</u> (June 12, 2006)
Exhibit D		Arbitration Award of Gerald McKay, <u>Barona Band of Mission Indians and Hotel Employees and Restaurant Employees Int’l Union</u> (February 4, 2003)
Exhibit E		Arbitration Award of Gerald McKay, <u>Barona Band of Mission Indians and Hotel Employees and Restaurant Employees Int’l Union</u> (December 2, 2003)
Exhibit F		Arbitration Award of Raul Ramirez, <u>Hotel Employees and Restaurant Employees Int’l Union and Agua Caliente Band of Cahuilla Indians</u> (March 3, 2004)
Exhibit G		Letter from Scott to Martin (February 22, 2008)

## TABLE OF AUTHORITIES

### CASES

<u>American Vantage Cos., Inc. v. Table Mountain Rancheria</u>	
292 F.3d 1091 (9th Cir. 2002) . . . . .	7
<u>C&amp;L Enterprises, Inc. v. Citizen Band of Potawatami Indian Tribe</u>	
532 U.S. 411 (2001) . . . . .	1, 12
<u>Cabazon Band of Mission Indians v. Wilson</u>	
124 F.3d 1050 (9th Cir. 1997), <i>cert. denied</i> 524 U.S. 926 (1998) . . . . .	1, 6, 7, 8, 9
<u>Comstock Oil &amp; Gas Inc. v. Alabama &amp; Coushatta Indian Tribes of Texas</u>	
261 F.3d 567 (5th Cir. 2001) . . . . .	17
<u>Confederated Tribes of Siletz Indians of Oregon v. State of Oregon</u>	
143 F.3d 481 (9th Cir. 1998) . . . . .	7
<u>Dewberry v. Kulongoski</u>	
406 F.Supp.2d 1136 (D. Or. 2005) . . . . .	10
<u>Franchise Tax Bd. v. Construction Laborers Vacation Trust</u>	
463 U.S. 1 (1983) . . . . .	8
<u>Gaming World Int’l Ltd. v. White Earth Band of Chippewa Indians</u>	
317 F.3d 840 (2003) . . . . .	9
<u>Gila River Indian Community v. Henningson, Durham &amp; Richardson</u>	
626 F.2d 708 (9th Cir. 1980) . . . . .	6
<u>Hein v. Capitan Grande Band of Diegueno Mission Indians</u>	
201 F.3d 1256 (9th Cir. 2000) . . . . .	10
<u>Howlett v. Salish &amp; Kootenai Tribes</u>	
529 F.2d 233 (9th Cir. 1976) . . . . .	18
<u>Idaho v. Shoshone-Bannock Tribes</u>	
465 F.3d 1095 (9th Cir. 2006) . . . . .	7, 15
<u>In re Indian Gaming Related Cases</u>	
331 F.3d 1094 (9th Cir. 2003) . . . . .	5, 6, 8

## TABLE OF AUTHORITIES

### CASES

<u>Johnson v. Gila River Indian Community</u>	
174 F.3d 1032 (9th Cir. 1999) . . . . .	16, 17
<u>Kasap v. Folger Nolan Fleming &amp; Douglas, Inc.</u>	
166 F.3d 1243 (D.C. Cir. 1999) . . . . .	1
<u>Krempel v. Prairie Island Indian Community</u>	
125 F.3d 621 (8th Cir. 1997) . . . . .	16
<u>Miller v. Gammie</u>	
335 F.3d 889 (9th Cir. 2003) . . . . .	9
<u>Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.</u>	
460 U.S. 1 (1983) . . . . .	11
<u>Nationwide Mutual Ins. Co. v. Liberator</u>	
408 F.3d 1158 (9th Cir. 2005) . . . . .	7
<u>Parrino v. FHP, Inc.</u>	
146 F.3d 699 (9th Cir. 1998) . . . . .	18
<u>Peabody Coal Co. v. Navajo Nation</u>	
373 F.3d 945 (9th Cir. 2004) . . . . .	8-10
<u>Seminole Tribe of Florida v. Florida</u>	
517 U.S. 44 (1996) . . . . .	4
<u>Sharber v. Spirit Mountain Gaming, Inc.</u>	
343 F.3d 974 (9th Cir. 2003) . . . . .	20
<u>Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Assoc., Inc.</u>	
86 F.3d 656 (7th Cir. 1996) . . . . .	12, 13
<u>Sycuan Band of Mission Indians v. Roache</u>	
54 F.3d 535 (9th Cir. 1994) . . . . .	4
<u>Thompson v. Illinois Dept. of Professional Regulation</u>	
300 F.3d 750 (7th Cir. 2002) . . . . .	19

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24  
25  
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TABLE OF AUTHORITIES

CASES

Vulcan Chemical Technologies, Inc. v. Barker  
297 F.3d 332 (4th Cir. 2002) ..... 12

Wise v. Wachovia Securities, LLC  
450 F.3d 265 (7th Cir. 2006), cert. denied 127 S.Ct. 582 (2006) ..... 8

STATUTES

8 U.S.C. § 2201 ..... 7

9 U.S.C. §§ 1-16 ..... 8

9 U.S.C. § 9 ..... 1, 11

25 U.S.C. § 2701 - 2721 ..... 2

25 U.S.C. § 2710 ..... 4, 5, 7, 11

28 U.S.C. § 1331 ..... 7

28 U.S.C. § 1362 ..... 7

MISCELLANEOUS

11 Moore’s Fed. Prac. §56.10[8][a] ..... 19

S. Rep. No. 100-446 (1988), reprinted in 1988 U.S.C.C.A.N. 3071 ..... 11

## INTRODUCTION

When the Pala Band of Mission Indians (“the Pala Band”) entered into a Tribal-State Gaming Compact with the State of California, it promised to allow employees of its casino to organize collectively without interference, to arbitrate disputes about organizing with labor unions, and to permit the resulting arbitration awards to be confirmed in federal court. The Pala Band now wants to break its promises. After a casino employee was disciplined for talking about the union, an arbitrator ordered the Pala Band to cease and desist from discriminating against union speech. The Pala Band baldly ignored that order a few months later when it forbade employees from passing out leaflets and cake celebrating a union victory. In response, UNITE HERE International Union (“UNITE HERE”) decided to confirm the arbitration award.

The Pala Band’s four arguments why this case should be dismissed are meritless. This case is brought to enforce the terms of Tribal-State Gaming Compact, and the Ninth Circuit holds that federal courts have jurisdiction over suits to enforce Tribal-State Gaming Compacts because they are a creation of federal law. Cabazon Band of Mission Indians v. Wilson, 124 F.3d 1050 (9th Cir. 1997), cert. denied 524 U.S. 926 (1998). Since there is an independent basis for federal jurisdiction, Section 9 of the Federal Arbitration Act creates a federal cause of action to confirm an arbitration award. 9 U.S.C. § 9. Sovereign immunity is not a defense because the Pala Band waived its sovereign immunity from suit when it agreed to arbitrate disputes and to permit the resulting arbitration awards to be confirmed in federal court. C&L Enterprises, Inc. v. Citizen Band of Potawatami Indian Tribe, 532 U.S. 411 (2001). Nor is UNITE HERE’s failure to file this case in tribal court a defense. UNITE HERE has exhausted its remedies in the Pala Band’s court. It attempted to file this case in the Intertribal Court of Southern California but was denied access to any information that would enable it to do so.

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## STATEMENT OF FACTS

In 1999, the Pala Band entered into a Tribal-State Gaming Compact with the State of California pursuant to the Indian Gaming Regulatory Act, 25 U.S.C, §§ 2701 – 2721 (“IGRA”). Section 10.7 of the Gaming Compact provides:

Notwithstanding any other provisions of this Compact, this Compact shall be null and void if, on or before October 13, 1999, the Tribe has not provided an agreement or other procedure acceptable to the State for addressing organizational and representational rights of Class III Gaming Employees and other employees associated with the Tribe’s Class III gaming enterprise, such as food and beverage, housekeeping, cleaning, bell and door services, and laundry employees at the Gaming Facility of any related facility, the only significant purpose of which is to facilitate patronage at the Gaming Facility

Petition, ¶ 6, Exh. A (pp. 4-5). Addendum “B” to the Gaming Compact provides that the Pala Band “agrees to adopt an ordinance identical to the Model Tribal Labor Relations Ordinance attached hereto.” Petition, ¶ 6, Exh A (p.7). On September 22, 1999, the Pala Band adopted the Model Tribal Labor Relations Ordinance (“TLRO”) as required by Section 10.7 of and Addendum “B” to the Gaming Compact. Petition, ¶ 7.

Section 13 of the TLRO provides a binding dispute resolution procedure that includes arbitration of disputes that arise under the TLRO:

The second level of binding dispute resolution shall be a resolution by the Tribal Labor Panel, consisting of ten (10) arbitrators appointed by mutual selection of the parties which panel shall serve all tribes that have adopted this ordinance. The Tribal Labor Panel shall have authority to hire staff and take other actions necessary to conduct elections, determine units, determine the scope of negotiations, hold hearings, subpoena witnesses, take testimony, and conduct all other activities needed to fulfill its obligations under this Tribal Labor Relations Ordinance.

\* \* \*

(2) Unless either party objects, one arbitrator from the Tribal Labor Panel will render a binding decision on the dispute under the Ordinance.

Petition, ¶ 10; see also Petition, ¶ 6, Exh. A (pp. 17-18) (full text of Section 13). In accordance with this provision, on March 16, 2007, UNITE HERE and the Pala Band held



1 an arbitration hearing to resolve a dispute that arose between them under the TLRO.  
2 Section 5(1) of the TLRO provides makes it an unfair labor practice for the tribe “to  
3 interfere with, restrain or coerce Eligible Employees in the exercise of their rights  
4 guaranteed herein.” Petition, ¶ 6, Exh. A (p. 11). Arbitrator Sara Adler decided that the  
5 Pala Band had an ad hoc rule that “prohibited speech about the Union while not prohibiting  
6 other non-work-related speech” and “[t]hat ad hoc rule constituted a ULP [unfair labor  
7 practice] under the TLRO” in violation of Section 5(1). Petition, ¶ 12, Exh. D (pp. 26-27).  
8 The award orders the Pala Band “to cease and desist from enforcing any rule regarding  
9 speech about the Union different from one enforced about any other non-work-related  
10 speech.” Petition, ¶¶ 12-13, Exh. D (p. 27).

11 After Arbitrator Adler issued the award, the Pala Band again violated Section 5(1) of  
12 the TLRO and the arbitration award by continuing to enforce rules regarding speech about  
13 UNITE HERE differently from other non-work-related speech. Petition, ¶ 15. In June  
14 2007, UNITE HERE and the Pala Band arbitrated an unrelated dispute about the indefinite  
15 suspension of Catalino Morales’s employment from the Pala Band’s casino. Arbitrator  
16 Franklin Silver ordered that Morales be returned to work, and on October 18, 2007, Morales  
17 was scheduled to return to work at the Pala Casino in accordance with Arbitrator Silver’s  
18 award. Petition, ¶ 16. On that day, Pala Casino employees distributed leaflets to their  
19 fellow employees in the employee cafeteria and in an outdoor employee break area. The  
20 leaflets announced “Union Wins Catalino Morales’ Job With Full Back Pay” and provided  
21 excerpts from the arbitrator’s opinion. Petition, ¶ 17, Exh. E (pp. 29-30). The Pala Band  
22 prohibited employees from distributing such leaflets because the leaflets announced UNITE  
23 HERE’s success in winning Morales’s reinstatement. Petition, ¶ 17. On the same day, the  
24 Pala Band prohibited employees from distributing slices of a cake to fellow employees in  
25 the employee cafeteria because the cake contained a message celebrating Morales’s return  
26 to work. Petition, ¶ 18.

1 The Pala Band allows Pala Casino employees to distribute leaflets that do not  
 2 contain a pronoun message in the employee cafeteria or the outdoor employee break area,  
 3 and to distribute cake and other food items that do not contain a pronoun message to fellow  
 4 employees in the employee cafeteria. Thus, the Pala Band violated the Arbitrator Adler's  
 5 award by prohibiting employees from distributing leaflets and cake containing a pronoun  
 6 message. Petition, ¶ 19. UNITE HERE now seeks to confirm Arbitrator Adler's award in  
 7 federal court.

## 8 ARGUMENT

### 9 **I. Federal courts have subject-matter jurisdiction over suits to enforce Tribal-State Gaming Compacts**

#### 10 **A. Tribal-State Gaming Compacts are a creation of federal statute**

11 Congress enacted IGRA "to provide a statutory basis for the operation and  
 12 regulation of gaming by Indian tribes." Seminole Tribe of Florida v. Florida, 517 U.S. 44,  
 13 48 (1996). IGRA establishes a comprehensive scheme for the regulation of gaming by  
 14 Indian tribes. Sycuan Band of Mission Indians v. Roache, 54 F.3d 535, 538 (9th Cir. 1994).  
 15 Different types of gaming, which IGRA classifies as Class I, Class II, and Class III gaming,  
 16 are regulated differently. 25 U.S.C. § 2710. Class III gaming "includes such things as slot  
 17 machines, casino games, banking card games, dog racing, and lotteries." Seminole Tribe,  
 18 517 U.S. at 47. Class III gaming is "lawful on Indian lands only if such activities are -- . . .  
 19 (C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe  
 20 and the State under paragraph (3) that is in effect." 25 U.S.C. § 2710(d)(1). IGRA also  
 21 governs the terms of Tribal-State Gaming Compacts:

22 Any Tribal-State compact negotiated under subparagraph (A) may include  
 23 provisions relating to –

24 (i) the application of the criminal and civil laws and regulations of the  
 Indian tribe or the State that are directly related to, and necessary for, the  
 25 licensing and regulation of such activity;

26 (ii) the allocation of criminal and civil jurisdiction between the State and  
 the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

25 U.S.C. § 2710(d)(3)(C).

In 1999, the Pala Band negotiated a Tribal-State Gaming Compact with the State of California so that it could operate a casino that offers Class III gaming. Petition, ¶ 6. The history of the California's negotiations in 1999 with Indian tribes in the state, including the Pala Band's active role in those negotiations, is recounted in In re Indian Gaming Related Cases, 331 F.3d 1094, 1096-1105 (9th Cir. 2003). In those negotiations, the State demanded that tribes and labor unions agree on the terms of labor organizing protections for casino employees:

During the negotiation of the Davis Compact [i.e. the Compact negotiated in 1999], the State did not demand that tribes adopt a specific set of legal rules governing general employment practices on tribal lands. Instead, it demanded that tribes meet with labor unions to negotiate independently a labor ordinance addressing only organizational and representational rights and applicable only to employees at tribal casinos and related facilities. This demand became Section 10.7 of the Davis Compact:

Notwithstanding any other provision of this Compact, this Compact shall be null and void if, on or before October 13, 1999, the Tribe has not provided an agreement or other procedure acceptable to the State for addressing the organizational and representational rights of Class III Gaming Employees and other employees associated with the Tribe's Class III gaming enterprise, such as food and beverage, housekeeping, cleaning, bell and door services, and laundry employees at the Gaming Facility or any related facility, the only significant purpose of which is to facilitate patronage at the Gaming Facility.

Id. at 1116. Compare Petition, ¶ 6, Exh. A (pp 4-5). The Gaming Compact also required

the Indian tribes to adopt a model Tribal Labor Relations Ordinance (“TLRO”), In re Indian Gaming Related Cases, 331 F.3d at 1116; which the Pala Band adopted. Petition, ¶ 6, Exh. B. The TLRO was a valid subject of Compact negotiations because it “is ‘directly related to the operation of gaming activities’ and thus permissible pursuant to 25 U.S.C. § 2710(d)(3)(C)(vii).” In re Indian Gaming Related Cases, 331 F.3d at 1116. The tribes also received ample consideration in exchange for agreeing to the TLRO: “[T]he State offered numerous concessions to the tribes in return for the Labor Relations provision (including the right to exclusive operation of Las Vegas style class III gaming in California).” Id.

**B. The Ninth Circuit’s Cabazon decision forecloses the Pala Band’s argument that jurisdiction is lacking**

Federal question jurisdiction exists to enforce IGRA compacts. In Cabazon Band of Mission Indians v. Wilson, 124 F.3d 1050 (9th Cir. 1997), cert. denied 524 U.S. 926 (1998), the Ninth Circuit held that federal jurisdiction exists to enforce an agreement in California’s Compact with gaming tribes:

Although it is true that the federal courts do not have jurisdiction over run-of-the-mill contract claims brought by Indian tribes, see Gila River Indian Community v. Henningson, Durham & Richardson, 626 F.2d 708 (9th Cir. 1980), this claim is not based on a contract that stands independent of the Compacts. Rather, it is based on an agreement contained within the Compacts and entered into by the parties, during their IGRA negotiations, in order to resolve a disputed question and to complete the Compacts. The State’s obligation to the Bands thus originates in the Compacts. The Compacts quite clearly are a creation of federal law; moreover, IGRA prescribes the permissible scope of the Compacts. We conclude that the Bands’ claim to enforce the Compacts arises under federal law and thus we have jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1362.

Id. at 1055-56; see also Confederated Tribes of Siletz Indians of Oregon v. State of Oregon, 143 F.3d 481, 484-85 (9th Cir. 1998) (characterizing a gaming compact as “a direct result of federal authority granted through IGRA”). The Ninth Circuit reasoned that “Congress, in passing IGRA, did not create a mechanism whereby states can make empty promises to

1 Indian tribes during negotiations of Tribal-State compacts, knowing that they may repudiate  
 2 them with immunity whenever it serves their purpose.” Cabazon, 124 F.3d at 1056. The  
 3 Court also cited IGRA’s express authorization of compact provisions providing for breach  
 4 of contract remedies:

5 Our conclusion is bolstered by IGRA’s express authorization of a compact to  
 6 provide remedies for breach of contract. 25 U.S.C. § 2710(d)(3)(C)(v). This  
 7 provision invites the tribe and the state to waive their respective immunities  
 8 and consent to suit in federal court. By envisioning the enforcement of a  
 compact and any contractual obligations assumed pursuant to a compact in  
 federal court, IGRA necessarily confers jurisdiction to the federal courts.

9 Id. at 1056.<sup>1</sup>

10 Cabazon means that there is federal jurisdiction over this case. This is a case to  
 11 enforce the provisions of the Pala Band’s Compact with California. The TLRO is not  
 12 independent of the Compact. Like the agreement in Cabazon, it is “an agreement contained  
 13 within the Compact[] and entered into by the parties, during their IGRA negotiations, in  
 14 order to resolve a disputed question and to complete the Compacts.” Id. at 1055-56. It is  
 15 also within the “permissible scope” of compact negotiations prescribed by IGRA because  
 16 IGRA authorizes tribes and states to negotiate for labor relations provisions such as the  
 17 TLRO. In re Indian Gaming Related Cases, 331 F.3d at 1116.

18 The Pala Band claims that jurisdiction existed in Cabazon only because California  
 19 argued that the Compacts violated IGRA. Res. Br., at 9. That argument is flatly wrong.  
 20 Nothing in the Cabazon opinion even suggests that this was the basis for the Court’s  
 21 jurisdictional holding. Moreover, the argument is illogical. In Cabazon, California asserted

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22 <sup>1</sup> Cabazon is not the only case in which the Ninth Circuit exercised its jurisdiction to  
 23 interpret an IGRA Compact. In Idaho v. Shoshone-Bannock Tribes, 465 F.3d 1095 (9th Cir.  
 24 2006), the Court reviewed a declaratory judgment interpreting an IGRA Compact. The  
 25 Declaratory Judgment Act, 28 U.S.C. § 2201, the statute under which that case was brought,  
 26 does not confer jurisdiction. Nationwide Mutual Ins. Co. v. Liberator, 408 F.3d 1158, 1161  
 (9th Cir. 2005). Tribes may not sue or be sued in diversity jurisdiction because they are not  
 citizens of any state. American Vantage Cos., Inc. v. Table Mountain Rancheria, 292 F.3d  
 1091, 1092 (9th Cir. 2002). Thus, IGRA provides the only possible basis for federal  
 jurisdiction.

1 that the Compacts were invalid as a defense to its breach of those Compacts. A defense  
 2 does not create federal jurisdiction, even if the defense is based on federal law. Franchise  
 3 Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 11-12 (1983).

4 **C. It makes no difference that UNITE HERE seeks to confirm**  
 5 **an arbitration award instead of litigating the underlying**  
 6 **Compact breach**

7 Cabazon stands for the proposition that there is federal jurisdiction over suits to  
 8 remedy breaches of IGRA compacts. Arbitration, and confirmation of the resulting  
 9 arbitration award in court, is a remedy for breach of contract. Moreover, if there is federal  
 10 jurisdiction over a breach of contract claim, then there is federal jurisdiction over claims  
 11 relating to arbitration of the breach. This is because the Federal Arbitration Act, 9 U.S.C.  
 12 §§ 1-16, “confers federal jurisdiction in cases involving arbitration only of disputes that,  
 13 were they litigated rather than arbitrated, would be within federal jurisdiction.” Wise v.  
 14 Wachovia Securities, LLC, 450 F.3d 265, 266 (7th Cir. 2006), cert. denied 127 S.Ct. 582  
 15 (2006). Thus, even if Cabazon’s jurisdictional rule were limited to pure breach of compact  
 16 claims, the Federal Arbitration Act, in conjunction with IGRA, would establish jurisdiction  
 in this case.

17 **D. Peabody Coal did not involve an IGRA compact.**

18 The Pala Band relies exclusively on Peabody Coal Co. v. Navajo Nation, 373 F.3d  
 19 945 (9th Cir. 2004) to argue that jurisdiction does not exist. In that case, the Ninth Circuit  
 20 held that federal jurisdiction did not exist to confirm an arbitration settlement agreement  
 21 issued pursuant to an arbitration agreement in a mining lease with an Indian tribe. Id. at  
 22 951. The coal company argued that jurisdiction existed because its lease with the Navajo  
 23 tribe was federally approved, but the Court rejected that argument: “Peabody’s claim here  
 24 does not allege any problem with the underlying leases or their amendments. The only  
 25 contract at issue in Peabody’s claim is the arbitration settlement agreement, which is not a  
 26 specialized type of contract that is subject to extensive federal regulation.” Id. In contrast,

1 IGRA compacts are “subject to extensive regulation.” Even if Peabody Coal stands for the  
 2 general proposition that Interior Department approval of an Indian tribe’s contract is  
 3 insufficient to create federal jurisdiction to enforce that contract, Peabody Coal still would  
 4 not require dismissal of this case. IGRA compacts are not merely approved by the Interior  
 5 Department. They are “quite clearly are a creation of federal law.” Cabazon, 124 F.3d at  
 6 1056. In short, Peabody Coal does not control this case because Peabody Coal did not  
 7 involve an IGRA compact.<sup>2</sup>

8 This distinction is reinforced by the Peabody Coal decision. The Court in Peabody  
 9 Coal made clear that its decision did not extend to contracts related to gaming. The Court  
 10 did not discuss any cases involving IGRA Compacts, including Cabazon, and distinguished  
 11 Gaming World Int’l Ltd. v. White Earth Band of Chippewa Indians, 317 F.3d 840, 848  
 12 (2003), which involved a contract related to Indian gaming (but not a Tribal-State Gaming  
 13 Compact), “because that case does not involve the validity of coal leases.” 373 F.3d at 950.

14 The Pala Band also suggests that the three-judge panel that decided Peabody  
 15 overruled Cabazon. That cannot be correct. A three-judge panel of the Ninth Circuit is  
 16 bound by prior decisions of other panels. Miller v. Gammie, 335 F.3d 889, 899 (9th Cir.  
 17 2003) (en banc) (holding that in the absence of intervening Supreme Court precedent, only  
 18 the en banc court may overrule a decision by a three-judge panel).

## 19 **II. There is a private right of action to confirm the arbitration award**

### 20 **A. There is a private right of action to enforce the terms of IGRA** 21 **Compacts**

22 The two cases on which the Pala Band relies to argue that there is not a private right  
 23 of action – Hein v. Capitan Grande Band of Diegueno Mission Indians, 201 F.3d 1256 (9th

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24 <sup>2</sup> The Court in Peabody Coal also noted that “the company has not alleged that either  
 25 party is failing to comply with the award” so “[t]here is simply no need for the award to be  
 26 ‘confirmed.’” 373 F.3d at 951. That is not true in this case. The Pala Band has baldly  
 breached the arbitration award by continuing to enforce rules regarding speech about the Union  
 differently from rules about other non-work-related speech.



1 Cir. 2000) and Dewberry v. Kulongoski, 406 F.Supp.2d 1136 (D. Or. 2005) – involved suits  
2 to enforce the statutory provisions of IGRA, not suits to enforce Tribal-State Compacts that  
3 were negotiated pursuant to IGRA. This is a critical distinction. UNITE HERE does not  
4 seek to enforce the statutory provisions of IGRA. UNITE HERE seeks to enforce a Tribal-  
5 State Compact negotiated pursuant to IGRA. If there were not a private cause of action to  
6 enforce the terms of an IGRA Compact, then the plaintiffs in Cabazon would not have had  
7 any cause of action. Neither Hein nor Dewberry addresses Cabazon at all.

8 The only support that the Pala Band provides that for the proposition that a private  
9 cause of action does not exist to enforce a gaming compact is one sentence in the district  
10 court opinion in Dewberry. That sentence is *dictum*, and possibly the result of sloppy  
11 drafting. The plaintiffs in Dewberry did not seek to enforce an IGRA compact; they  
12 challenged a gaming compact as violating IGRA. 406 F.Supp.2d at 1138-39. Moreover,  
13 the only case that Dewberry cites for this proposition is Hein, for which it provides the  
14 following parenthetical explanation: “finding no general private right of action to enforce  
15 IGRA.” Id. at 1146 (emphasis added).

16 Allowing suits to enforce Tribal-State Compacts, but not suits to enforce IGRA, is  
17 consistent with the general scheme of IGRA. IGRA expressly authorizes the parties to  
18 negotiate over remedies for breach of contract, 25 U.S.C. § 2710(d)(3)(C)(v); and Congress  
19 intended to give the parties flexibility in negotiating compact terms: “This legislation is  
20 intended to provide a means by which tribal and State governments can realize their unique  
21 and individual governmental objectives . . . .” S. REP. NO. 100-446 (1988), reprinted in  
22 1988 U.S.C.C.A.N. 3071, 3076. Allowing suits in federal court facilitates agreement  
23 between tribes and states about “remedies for breach of contract.” The federal courts will  
24 likely be perceived by both tribes and states as more neutral than either tribal courts or state  
25 courts. If the federal courts were not an available venue, either the tribe or the state would  
26



1 have to agree to be sued in the opposing party's courts. Limiting tribes' and states' options  
2 this way when negotiating Gaming Compacts would not facilitate agreement.

3 **B. The Federal Arbitration Act creates a cause of action to confirm  
4 an arbitration award**

5 UNITE HERE also has a cause of action that arises under Section 9 of the Federal  
6 Arbitration Act. Section 9 provides:

7 If the parties in their agreement have agreed that a judgment of the court shall  
8 be entered upon the award made pursuant to the arbitration, and shall specify  
9 the court, then at any time within one year after the award is made any party  
10 to the arbitration may apply to the court so specified for an order confirming  
11 the award, and thereupon the court so specified must grant such an order  
12 unless the award is vacated.

13 9 U.S.C. § 9. While Section 9 does not independently create federal question jurisdiction, it  
14 does create a cause of action to confirm an arbitration award which can be brought in  
15 federal court if there is an independent basis for jurisdiction. Moses H. Cone Memorial  
16 Hospital v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983); see also Kasap v. Folger  
17 Nolan Fleming & Douglas, Inc., 166 F.3d 1243, 1245 (D.C. Cir. 1999) ("The Federal  
18 Arbitration Act creates several federal causes of action relating to arbitration agreements.");  
19 Vulcan Chemical Technologies, Inc. v. Barker, 297 F.3d 332, 337 (4th Cir. 2002) (holding  
20 that the FAA "creates a separate cause of action to vacate an arbitration award").

21 **III. The Pala Band waived its sovereign immunity by agreeing to arbitrate  
22 disputes under the TLRO**

23 **A. An agreement to arbitrate constitutes a waiver of sovereign  
24 immunity**

25 The Pala Band argues that the arbitration award may not be confirmed because it has  
26 not expressly waived its sovereign immunity in federal court. This argument is definitely  
foreclosed by the Supreme Court's decision in C&L Enterprises, Inc. v. Citizen Band of  
Potawatami Indian Tribe, 532 U.S. 411 (2001).

///  
26

1 In C&L Enterprises, the Court held that a tribe's agreement to arbitrate and to court  
2 enforcement of the resulting award unambiguously waives the tribe's sovereign immunity  
3 from a suit:

4 [T]he Tribe agreed, by express contract, to adhere to certain dispute  
5 resolution procedures. In fact, the Tribe itself tendered the contract calling  
6 for those procedures. The regime to which the Tribe subscribed includes  
7 entry of judgment upon an arbitration award in accordance with the  
8 Oklahoma Uniform Arbitration Act. That Act concerns arbitration in  
9 Oklahoma and correspondingly designates as enforcement forums "courts of  
10 competent jurisdiction of Oklahoma." C&L selected for its enforcement suit  
11 just such a forum. In a case involving an arbitration clause essentially  
12 indistinguishable from the one to which the Tribe and C&L agreed, the  
13 Seventh Circuit stated:

14 "There is nothing ambiguous about the language of the arbitration clause.  
15 The tribe agrees to submit disputes arising under the contract to arbitration, to  
16 be bound by the arbitration award, and to have its submission and the award  
17 enforced in a court of law. \* \* \* The tribal immunity waiver is implicit  
18 rather than explicit only if a waiver of sovereign immunity, to be deemed  
19 explicit, must use the words 'sovereign immunity.' No such case has ever  
20 held that."

21 That cogent observation holds as well for the case we confront.

22 Id. at 420 (quoting Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Assoc., Inc.,  
23 86 F.3d 656, 659-60 (7th Cir. 1996)). The Seventh Circuit's opinion in Sokoagon Gaming  
24 explains the rationale for finding a waiver in more detail:

25 [T]he only purpose that a requirement of a clear statement [waiving sovereign  
26 immunity] could serve would be the admittedly, perhaps archaically,  
paternalistic purpose of protecting the tribe against being tricked by a  
contractor into surrendering a valuable right for insufficient consideration.  
... [S]upposing there is such a requirement, we must ask whether the  
language of the arbitration clause might have hoodwinked an unsophisticated  
Indian negotiator into giving up the tribe's immunity from suit without  
realizing he was doing so. We think this is extremely implausible, as well as  
condescending, suggestion. The arbitration clause could not be much clearer.  
It says that if there is a dispute under the contract it must be submitted to  
arbitration and that the arbitrator's decision is final and is enforceable in  
court. No one reading this clause could doubt that the effect was to make the  
tribe suable.

86 F.3d at 660.

1 The same is true here. In Section 13(d) of the TLRO, the Pala Band agreed  
 2 unambiguously that it would submit disputes under the TLRO to arbitration and that  
 3 arbitration awards may be confirmed in federal court:

4 Under the third level of binding dispute resolution, either party may seek a  
 5 motion to compel arbitration or a motion to confirm an arbitration award in  
 6 Tribal Court, which may be appealed to federal court. If the Tribal Court  
 does not render its decision within 90 days, or in the event there is no Tribal  
 Court, the matter may proceed directly to federal court.

7 Petition, ¶ 6, Exh. A (p. 18). No one reading this provision could fail to understand that the  
 8 Pala Band could be sued in federal court.<sup>3</sup>

9 The Pala Band argues that the next sentence of Section 13(d) shows that it did not  
 10 intend to waive its immunity in federal court, because it expressly waived its immunity in  
 11 state court. But this sentence undermines the Pala Band's sovereign immunity defense  
 12 because it uses the magic words "sovereign immunity": "In the event the federal court  
 13 declines jurisdiction, the tribe agrees to a limited waiver of its sovereign immunity for the  
 14 sole purpose of compelling arbitration or confirming an arbitration award issued pursuant to  
 15 the Ordinance in the appropriate state superior court." This sentence provides further  
 16 evidence that the Pala Band knew when it agreed to the TLRO that it was waiving its  
 17 sovereign immunity. The Pala Band was not hoodwinked.

#### 18 **B. UNITE HERE can enforce the TLRO**

19 The Pala Band also argues that only the State of California can enforce the TLRO.  
 20 That argument lacks merit. The TLRO's dispute resolution procedures refer to "parties."  
 21 Section 13(b) states that "[t]he parties agree to pursue in good faith the expeditious  
 22 resolution of these matters within strict time limits." Section 13(c), which sets out the  
 23 arbitration procedure, permits "the parties" to select arbitrators. Section 13(d) states that

24  
 25  
 26 <sup>3</sup> The issue whether UNITE HERE satisfied Section 13(d)'s provision regarding the  
 tribal court is addressed in the next section of this brief.

1 “either party may seek a motion to compel arbitration or a motion to confirm an arbitration  
 2 award.” Petition, ¶ 6, Exh. A (p. 17-18). The rest of the TLRO makes clear that the term  
 3 “parties” means unions and tribes. The TLRO repeatedly refers to unions, but does not  
 4 refer to the State of California at all. In addition, Sections 10(d) and 11(e) provide that  
 5 “[t]he tribe or the union may appeal any decision rendered after the date of the election by  
 6 the election officer to a three (3) member panel of the Tribal Labor Panel mutually chosen  
 7 by both parties.” Petition, ¶ 6, Exh. A (pp. 15-16). These provisions would not make sense  
 8 if “parties” referred only to the State and the Pala Band.<sup>4</sup>

9 The history of dispute resolution under the TLRO also demonstrates that UNITE  
 10 HERE may enforce the TLRO through arbitration and confirmation of the resulting awards.  
 11 There have been five arbitration proceedings under the TLRO’s dispute resolution  
 12 provisions with four different Indian tribes, including the Pala Band. Each dispute was  
 13 submitted to arbitration by the Petitioner in this case, UNITE HERE International Union  
 14 (formerly known as Hotel Employees and Restaurant Employees International Union).  
 15 Petition, ¶ 12, Exh. D; Martin Decl., ¶ 9, Exh. C-F (pp. 12-56). None of the tribes have  
 16 ever asserted in the arbitration proceedings that only the State of California could use the  
 17 TLRO’s dispute resolution provisions to challenge an Indian tribe’s breach of the TLRO.  
 18 Martin Decl., ¶ 9.

19 The Pala Band also points to Section 9 of the Gaming Compact, which creates  
 20 establishes a separate arbitration procedure for disputes under other provisions of the  
 21 Compact and states that no one other the Pala Band or the State can invoke these  
 22 procedures. But “[s]pecific terms of a contract govern inconsistent, more general terms.”  
 23 Shoshone-Bannock Tribes, 465 F.3d at 1099 (applying contract law principles to interpret

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24  
 25 <sup>4</sup> Extrinsic evidence would likely provide additional evidence that it was intended that  
 26 unions, rather than the State, would enforce the TLRO’s provisions. Martin Decl., ¶ 11.

an IGRA compact). Section 9 does not apply to the TLRO because the TLRO contains its own dispute resolution procedure.

#### **IV. UNITE HERE exhausted existing tribal court remedies**

Section 13(d) of the Gaming Compact's TLRO provides that "[u]nder the third level of binding dispute resolution, either party may seek a motion to compel arbitration or a motion to confirm an arbitration award in Tribal Court, which may be appealed to federal court. If the Tribal Court does not render its decision within 90 days, or in the event there is no Tribal Court, the matter may proceed directly to federal court." Petition, ¶ 20. The Pala Band contends that Section 13(d) means that this case should have been brought first in the Intertribal Court of Southern California. UNITE HERE attempted to file this case in the Intertribal Court but was denied access to that forum.<sup>5</sup>

##### **A. It was impossible for UNITE HERE to file this case in the Intertribal Court of Southern California**

The Intertribal Court does not make information available to the public about how to file a case in its court, such as what form pleadings must take, where the papers must be filed, the filing fee, rules about service, bar admission rules, or any other the rules of practice or procedure. UNITE HERE's counsel contacted the Intertribal Court to try to obtain this information. She was told that the Intertribal Court performs centralized administrative functions for each member tribe, but said that each tribe has its own court; that the Pala Band does not make its rules about practicing and procedure in its court available to the public; and that the Pala Band's court is a court of limited jurisdiction, but that statements of the court's jurisdiction is not available to the public. Martin Decl., ¶¶ 3-6. The only information that the Intertribal Court provided was a "Tribal Court Intake

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<sup>5</sup> UNITE HERE did not allege, as the Pala Band asserts, that "the Pala Tribe is not a member of a Tribal Court." Res. Bf., at 14. Rather, UNITE HERE alleged that "[t]he Union brings this motion to confirm the Arbitration Award directly in this Court because the Pala Band does not have a court in which the Union may file this motion." Petition, ¶ 21 (emphasis added). This is a more precise allegation to which the Pala Band has not responded.

1 Review Form” which advised the recipient to consult an attorney. Martin Decl., ¶ 6 (p. 8).  
 2 UNITE HERE was effectively denied access to the Intertribal Court.

3 The Pala Band may argue in its reply brief that UNITE HERE should have  
 4 completed the Tribal Court Intake Review Form and waited for a response. However, filing  
 5 out this form is not the same as filing a case. The form itself makes clear that the response  
 6 “is not meant to be a determination of your case or controversy nor is it a court order.”  
 7 Martin Decl., ¶ 6, Exh. A (p. 8). Moreover, the TLRO does not allow the Pala Band to  
 8 delay confirmation of an award by requiring UNITE HERE to take steps in advance of  
 9 filing. The TLRO requires speedy resolution of disputes. Section 13(d) gives the Tribal  
 10 Court only ninety days to render a decision. This strict time-limit would become  
 11 meaningless if the Pala Band were able to require UNITE HERE to file nonbinding intake  
 12 forms before filing a case.

13 **B. Exhaustion of tribal remedies is not required in a non-functioning**  
 14 **tribal court**

15 UNITE HERE’s position here finds support in the exhaustion of tribal remedies  
 16 doctrine. Under that doctrine, exhaustion is not required if there is not a functioning tribal  
 17 court system at the time the federal case is filed. Johnson v. Gila River Indian Community,  
 18 174 F.3d 1032, 1036 (9th Cir. 1999) (“[I]f a functioning appellate court does not exist,  
 19 exhaustion is per se futile.”); Krempel v. Prairie Island Indian Community, 125 F.3d 621,  
 20 622 (8th Cir. 1997) (“[I]f there is no functioning tribal court, exhaustion would be futile and  
 21 therefore would not be required.”) It is not enough that the tribe asserts that it has a court or  
 22 even produces documents proving the existence of a court. A function court is one that  
 23 follows established rules of court and responds to inquiries. Johnson, 174 F.3d at 1036. In  
 24 that case, the plaintiff filed suit in federal court four months after he began sending papers  
 25 to and requesting information from the tribal court. The district court dismissed the case for  
 26 failure to exhaust tribal remedies, but the Ninth Circuit reversed: “[T]he lack of a briefing  
 schedule, scheduled appellate argument, a meaningful response to the notice of appeal, or

1 any answer to any of [the plaintiff's] correspondence for an abnormally extensive period of  
2 time [four months] create doubt that a functioning appellate court exists." Id.

3 The facts here create even more doubt that the Pala Band had established a  
4 functioning court. While the plaintiff in Johnson was able to file an appeal, UNITE HERE  
5 was informed that the Intertribal Court is not really a court, that the Pala Band's court has  
6 limited jurisdiction, and that there are no public rules about how to proceed in that court or  
7 the scope of its jurisdiction. Martin Decl., ¶¶ 3-6.

8 The evidence that the Pala Band submitted with its motion to dismiss only adds to  
9 the doubt. The Pala Band filed a document entitled "Intertribal Court of Southern  
10 California – Governing Agreement (Adopted 2006)," Res. Exh. 2 (p. 7); but there is no  
11 evidence that the Pala Band adopted this document. The Pala Band's counsel previously  
12 asserted in correspondence that a signature page (which is Respondent's Exhibit 5) is  
13 evidence that the Pala Band approved the 2006 Governing Agreement. Martin Decl., ¶ 10,  
14 Exh. G (p. 58) ("2. Intertribal Court of Southern California Governing Agreement; 3.  
15 Approval of the Governing Agreement referenced in Item 2.") That cannot be true because  
16 the Governing Agreement is dated 2006 and the signature page is dated January 2005. The  
17 Pala Band also asserts that "[t]he ICSC will assert jurisdiction over a petition to confirm an  
18 arbitration award issued following an arbitration involving the TLRO if it is asked to do  
19 so." Res. Br., at 13. The Pala Band cites no support for this assertion. Presumably, the Pala  
20 Band's counsel does not have authority to decide in litigation what decisions would be  
21 made by its court, if a court were functioning. Exhaustion is not required in a tribal court  
22 that is not properly established or that does not have the power to grant relief. Comstock  
23 Oil & Gas Inc. v. Alabama & Coushatta Indian Tribes of Texas, 261 F.3d 567, 572 (5th Cir.  
24 2001) (holding that there is no duty to exhaust remedies before a tribal court that is not  
25 properly established by tribal government); Howlett v. Salish & Kootenai Tribes, 529 F.2d  
26 233, 240 (9th Cir. 1976) (holding that exhaustion before tribal court would be futile because



1 tribal court judge told plaintiff's council that he did not believe the tribal court had the  
2 power to grant plaintiffs the relief sought).

3 **V. If the Court does not deny the Pala Band's motion to dismiss, the motion**  
4 **should be converted to a Rule 56 motion for summary judgment and**  
5 **continued to allow UNITE HERE to conduct discovery**

6 The Pala Band's Rule 12(b)(6) motion relies on evidence about the Intertribal Court  
7 that the Pala Band filed with its motion. "Where a defendant attaches extrinsic evidence to  
8 a Rule 12(b)(6) motion, the court ordinarily must convert that motion convert that motion  
9 into one for summary judgment under Rule 56 to give the plaintiff an opportunity to  
10 respond." Parrino v. FHP, Inc., 146 F.3d 699, 706 n.4 (9th Cir. 1998). If the Court does  
11 not deny the Pala Band's motion to dismiss, UNITE HERE requests a Rule 56(f)  
12 continuance to conduct discovery.

13 There is a limited exception to this conversion to summary judgment rule where "an  
14 attached document is integral to the plaintiff's claims and its authenticity is not disputed  
15 because the plaintiff obviously is on notice of the contents of the document." Id. That  
16 exception does not apply here. UNITE HERE alleged in the Petition that "the Pala Band  
17 does not have a court in which the Union may file this motion." Petition, ¶ 21 (emphasis  
18 added). The evidence filed in support of the Pala Band's motion is not integral to UNITE  
19 HERE's allegation about its access to the tribal court. The mere existence of the Intertribal  
20 Court does not prove that UNITE HERE could have filed its petition in the Intertribal  
21 Court. The reason that UNITE HERE could not file its petition in the Intertribal Court is  
22 because the Intertribal Court's administrator told UNITE HERE's counsel that she could  
23 not do so and refused to provide any information about the court's procedures that would  
24 enable her to do so. Moreover, UNITE HERE was not on notice of these documents when  
25  
26



1 it filed the Petition in December 2007. A representative of the Intertribal Court told that  
 2 Pala Band that these documents were not available to the public. Martin Decl., ¶¶3-6.<sup>6</sup>

3 Rule 56(f) authorizes a district court to deny a summary judgment motion and order  
 4 a continuance to permit discovery if a party opposing a summary judgment motion cannot  
 5 “present by affidavit facts essential to justify the party’s opposition.” FED. R. CIV. P. 56(f).  
 6 Rule 56(f) motions are generally favored and liberally granted. See 11 Moore’s Fed.  
 7 Prac. § 56.10[8][a]. Here, the Pala Band’s motion for summary judgment is premature  
 8 because UNITE HERE has not had the opportunity to develop evidence to controvert  
 9 assertions made by the Pala Band about its court system. This evidence is within the Pala  
 10 Band’s control. UNITE HERE should be given the opportunity to develop extrinsic  
 11 evidence about whether the Pala Tribe had a functioning court in December 2006 when this  
 12 case was filed. Martin Decl., ¶ 11.

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 23 <sup>6</sup> The Pala Band cites Thompson v. Illinois Dept. of Professional Regulation, 300 F.3d  
 24 750, 754 (7th Cir. 2002) for the proposition that “[w]hen a written instrument contradicts  
 25 allegations in the complaint, ‘the exhibit trumps the allegations.’” Res. Br., at 6 (quoting  
 26 Thompson, 300 F.3d at 754). That is not what Thompson says and the Pala Band’s brief leaves  
 out a key phrase. What Thompson says is “that when a written instrument contradicts  
 allegations in the complaint to which it is attached, the exhibit trumps the allegations.” 300  
 F.3d at 754 (emphasis added).

**CONCLUSION**

For all of the foregoing reasons, Respondent's motion to dismiss should be denied, or, in the alternative, a Rule 56(f) continuance granted. If, however, the Court believes that this case should be filed first in the Intertribal Court, then proceedings should be stayed while Petitioner does so. Sharber v. Spirit Mountain Gaming, Inc., 343 F.3d 974, 976 (9th Cir. 2003) (staying proceedings in district court while tribal remedies are exhausted).

DATED: May 5, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY AND CITY OF SAN FRANCISCO

On May 5, 2008, I caused to be served the foregoing:

- 1) PETITIONER UNITE HERE INTERNATIONAL UNION'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS; REQUEST FOR RULE 56(f) CONTINUANCE and
- 2) DECLARATION OF KRISTIN L. MARTIN IN SUPPORT OF OPPOSITION TO MOTION TO DISMISS

true and correct copies addressed as follows:

Theodore R.Scott  
Littler Mendelson  
501 West Broadway, Suite 900  
San Diego, California 92101-3577

Respondent

☒ (BY MAIL) I am "readily familiar" with the firm's practice for collection and processing correspondence for mailing. Under that practice, I deposited in a box or other facility regularly maintained by UNITED STATES POSTAL SERVICE, first-class postage fully prepaid thereon.

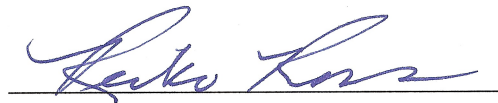
☒ (BY ECF FILING) The undersigned hereby certifies that true and correct copies of the following document(s) were served electronically through the Southern District of California (San Diego) ECF system on May 5, 2008.

☐ (BY OVERNIGHT DELIVERY) I caused said envelope(s) to be delivered overnight via an overnight delivery service in lieu of delivery by mail to the addressee(s).

☐ (BY FAX) At \_\_\_\_\_ m., I transmitted, pursuant to Rules 2001 et. seq., the above-described document by facsimile machine (which complied with Rule 2003(3)), to the above-listed fax number(s). The transmission originated from facsimile phone number (415) 597-7201 and was reported as complete and without error. The facsimile machine properly issued a transmission report, a copy of which is attached hereto.

Executed on May 5, 2008, at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.



Reiko Ross